United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7293

To be argued by
THOMAS H. HEALEY

United States Court of Appeals
FOR THE SECOND CIRCUIT

LEONARD IMANUEL,

Plaintiff,

against

LYKES BROS. STEAMSHIP CO. INC.,

Defendant and Third-Party Plaintiff-Appellant,

against

TODD SHIPYARDS CORPORATION,

Third-Party Defendant-Appellee.

APPELLEE'S BRIEF

HEALEY, STONEBRIDGE & MCCAFFREY
Attorneys for Appellee
Office & P. O. Address
19 Rector Street
New York, New York 10006
(212) 943-3520

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Preliminary

This is the Third-Party Defendant/Appellee's brief in opposition to Third-Party Plaintiff/Appellant's brief. Throughout, plaintiff shall be referred to as "Imanuel", defendant and third-party plaintiff/appellant as "Lykes" and third-party defendant/appellee as "Todd".

Nature of the Case

Imanuel suffered serious injury on December 10, 1971 while serving as second electrician aboard Lykes' ship NANCY LYKES when an elevator cable broke. Todd had, be-

fore the accident, performed repairs on board the vessel. Lykes claims Todd breached its warranty of workmanlike service and sought indemnity.

The Issues

The sole issue in this case is whether the District Court was clearly erroneous in finding that Lykes failed to meet its burden by a preponderance of the evidence and did not establish that Todd damaged the cable. (Lykes misstates the issue in arguing that the District Judge held that no prima facie case was made out.)

The Facts

The NANCY LYKES was put into Todd Shipyard for elongation and repairs. The vessel had an engineroom lift, sometimes called "elevator", designed for the sole purpose of removing waste and supplying stores to the engineroom, since the vessel had no other access to the engineroom spaces.*

According to the stipulated facts contained in the pretrial order, NANCY LYKES was delivered by Lykes to Todd Shipyard on June 2, 1971 to be elongated and for major repairs. These repairs were completed on October 15, 1971. Due to a longshoreman's strike, Lykes did not recrew until about December 2, 1971. No work was performed by Todd from October 15, 1971 until December when Lykes accepted and began to crew the vessel. Between December 2nd and 8th, 1971 Todd performed additional work at Lykes' request in the engineroom. Access plates between the engineroom and hold No. 4 had been sealed by Todd in October on completion of the major repairs. This new work

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* Special exhibits 1 and 2 as well as Exhibit F are appended hereto for the purpose of clarifying the lift and its operation.

requested by Lykes required the use of the engineroom shaft, since the vessel did not have skylight and use of the engineroom lift had been prohibited by Lykes. Todd has stipulated, and it is so shown in the pre-trial order, that from 5 to 7 pieces of relatively small equipment were removed and replaced by Todd into the engineroom spaces. The largest and heaviest piece was a manifold weighing somewhere between 300 and 380 pounds. On December 10, Imanuel, Second Electrician on the NANCY LYKES and his boss, Herman Haag, the Electrician, were instructed to put the engineroom lift into operation. There is no evidence or claim that the engineroom lift (the elevator) had been used or damaged by Todd. It had been out of use, according to Lykes' requirements, from June until December when Lykes' engineer ordered the electricians to "put it back in use." Imanuel testified that he had ridden from the bottom to the top of the shaft and returned during a two-hour period in the morning of December 10. It was further ridden by his boss, Haag. Nothing was wrong with the cable. Imanuel assumed that crew members had used the elevator to remove waste or replenish stores between the period of December 2 to December 10. Normally, the lift operated automatically by push buttons located at the various engineroom levels and on the main deck, similar to a shore-side passenger elevator. Imanuel testified that the lift was being operated from the control room by jamming the relay closed with a screwdriver and so bypassing electrically some five to seven built-in electrical safety devices. Haag, his boss, did not know the lift was equipped with a "broken rope safety". Haag had ridden from the bottom of the lift shaft almost to the top and testified that the lift functioned normally. If anything awkward had occurred, he would "jump out". He did not look at the cables. Imanuel had looked at the cables and saw nothing wrong with them. Taking turns, Imanuel and Haag, one riding the lift and the other in the control room using his screwdriver, would cause the lift to be raised or

lowered. The method of stopping the lift was by a shout or the tap of a hammer against the lift shaft. Imanuel has testified that to do their checking in the manner adopted by them was "very dangerous". He testified that the lift could not operate at normal speed, that it was a slow procedure and that one has to be very careful. He further testified that if the lift has passed the top limit switch "he don't know what might happen then." Their alternative method of riding the shaft was to rig a bosun's chair. After working on the lift for one to two hours in the morning and one to two hours in the afternoon and with Imanuel assuming that other engineroom personnel had used the lift between December 2 and December 10, the date of the accident, Imanuel and Haag boarded the platform near the top. As Haag stepped out, a loud noise was heard and the platform fell sixty feet to the bottom. After, the cables were found cut through, as though with a sudden knife blow. The cut was new, the strands showed no evidence of stress, bruises, etc.

Mr. DiCocco, an employee of Energy Elevators, Inc., testified at the trial that by forcibly closing the relay, all seven safety features were bypassed. The broken rope safety mechanically engaged the side rails if tension on the cables failed. Its purpose was to prevent the type of free fall that happened. Why it didn't work is clear since Haag did not know it existed and so never maintained it. Mr. Haag testified that lubrication of the cables and mechanical parts were not in his department but rather in the engineering department of the vessel. This, despite Mr. Imanuel's testimony that he had lubricated the cables manually from end to end, there is no testimony that any ship's personnel had ever lubricated the broken rope safety from the time the ship was built to the date of the accident. DiCocco explained that lubrication can be effected only by an alemite gun and fitting. Haag did not know about this. It is further interesting to note that although Lykes have had at least three surveys and one metallurgic testing of

the cable, that Todd was not invited to attend any. In fact, Lykes' employee, Peuler, some ten to twelve months after the accident first thought it might have been caused by something Todd had done during the six months the vessel had been in the Todd yard. Mr. Thompson, Salvage Association surveyor, could only express the opinion in his report to Lykes:

> "The undersigned was unable to find any mechanical fault which could have resulted in the failure of the elevator cable, and can only suggest the possibility that during the course of recent conversion at Galveston, Texas, materials had been removed from the vessel through the elevator shaft, and that the cables had been damaged at that time, resulting in final failure on December 10, 1971."

Interrogatories and Requests to Admit Were Submitted to Todd

Facts

Lykes has complained of the inaccuracy of answers to interrogatories filed by it. This requires a review of the history of the litigation. According to the docket, Imanuel filed a complaint against Lykes in February of 1972. Lykes filed a third-party complaint against Todd in November of 1972 together with interrogatories addressed to third-party defendant. On October 5, 1973 Todd answered the interrogatories in an inaccurate manner. Based upon information in its file, Todd's then counsel denied that Todd had used the engineroom lift shaft to move the equipment into or out of the engineroom. This case was referred to this office in the fall of 1974. A complete review of Todd's previous counsel's file and telephone conversations with Todd's personnel, both in New York and in Texas indicated that Todd had never used the engineroom shaft. It was suggested by Todd's current attorneys in January 1975 to

Lykes' attorney that we proceed to Galveston to interview and depose Todd's personnel. At first Todd's personnel denied recollection of having worked on board the NANCY LYKES and denied that the engineroom lift shaft had been used by Todd for any purpose from June to December 1971. Having interviewed other Todd employees and attended their depositions, Todd's attorneys promptly stipulated that from December 3 to December 5, 1971 certain items were removed through the engineroom lift shaft. The pre-trial order contains stipulation of facts (Appendix 37a) which reads in full:

> "(13) The access plates which had been opened in the engine room spaces during elongation work had been completely closed by October 15, 1971.
>
> (14) The NANCY LYKES does not have a skylight in her engine room. However, Todd used the engine room lift shaft to fleet certain materials into and out of the engine room during the period December 3 through December 5 while the NANCY LYKES was at the Todd yard. (This stipulation is made without limitation to Lykes' contention that the engine room shaft also was used by Todd during the entire period that the NANCY LYKES was at the Todd Yard).
>
> (15) Lykes had requested Todd not to use the platform. It was left at the bottom of the shaft and was not used by Todd.
>
> (16) Todd performed no actual work in connection with the maintenance, etc. on any part or portion of the engine platform lift.
>
> (17) Since it is stipulated that defendant will offer no factual witnesses Lykes stipulates that there is no eyewitness proof that any of the materials moved by Todd through the shaft contacted or damaged the cables."

The Use of the Elevator Shaft by Todd

As stated immediately above, the pre-trial order sets forth a stipulation to the effect that Todd had used the elevator shaft in December of 1971.

Although Lykes seems to mislead this court into believing that it was unaware of Todd's use of the shaft, it is blatantly false when in fact Exhibit 22a, James William Wolfe's statement dated June 18, 1974 given to Lykes' investigator, clearly admits the use of the shaft by Todd. Lykes' counsel, in an attempt to mislead Todd's trial counsel, who had not yet learned of the use of the shaft, concealed this statement until March of 1975. Mr. Doti admitted in reply to Judge Palmieri's questioning that he knew Todd's counsel was making a good faith effort to develop the truth, but had difficulties obtaining information from Todd's Galveston employees. If Lykes had revealed the contents of the statement, the confusion claimed by Lykes would not have occurred.

Movement of the Manifold through and out of the Elevator Shaft

The statement of Lykes that Ed Welch testified that the end of the sling was more than 100 ft. from the end of the boom of Todd's crane, is incorrect. The testimony established that the sling length was approximately 60 ft., i.e., from the top of the shaft to the bottom, with the head of the boom lowered directly over the center of the shaft (TT p. 194a).

The Court's Rulings

On the evidence submitted on trial, the court found that Lykes had failed to sustain its burden of proof that Todd damaged the elevator, and that Todd was not proved negligent, not to have breached its warranty of workmanlike service.

Both of these conclusions are fully supported by the evidence. Todd's expert. Brierly, had no idea as to what

had caused the cables to part (he felt the lift's own sheaves might have cut the cable). His testimony is that almost one year later he first developed the theory that possibly something Todd had done during the repair might have been the cause of the accident. The testimony of Noel Thompson similarly contains no evidence that Todd was responsible for the cutting of the cables. He visually and manually inspected the cables immediately, and, contrary to Lykes' "theory" found them free of impact damage. The cut was administered by a "sharp cutting edge", not a blunt instrument like the manifold. There are several sharp cutting edges on the lift itself. The same is true of the testimony of Roger Kiste. Lykes' "expert" Kiste, conducted tests months later. As the court noted they were hardly "scientific". Lykes first gave the cable to "Dixie Machine Works" who hacked it into sixteen pieces and then found they did not have the necessary tension testing gear. The cable pieces were stuffed into a small heavy wooden box and left in a New Orleans warehouse. Finally they were freighted to Pittsburg, probably bruised and battered in transit. An essential element for Kiste was to determine which was the top, which the bottom of the cable. He had them backwards.

The exact length of the cable from anchor to cut was crucial to reconstruct the position of the lift at the instant of cutting. Kiste measured this by "pacing it off" in the Court Hall at a recess. The Court found Kiste unpersuasive.

POINT I

There is no proof that Todd damaged the cables or breached its warranty of workmanlike service.

Lykes, faced with potential serious liability to Imanuel and glossing over the very dangerous method adopted by Imanuel and Haag to check the electric circuits of the en-

gineroom lift, were searching for a third-party to pass that liability over to. They chose Todd, but their proof has failed to sustain their burden by a preponderance of the credible evidence.

It is suggested by Todd that if the cables had been cut as cleanly as described by Lykes' witness, prior to the date of the accident, the cables would not have sustained even the weight of the engineroom platform, but would have broken before the lift left the floor of the engineroom shaft. They would have broken as soon as the drum in the control room put a strain on the cables. The testimony is clear that the dents in the shaft walls were so positioned behind the track and more than a foot to the side of the cables so that a blow on that part of the shaft would miss the cable by at least a foot. It is not clear when the denting occurred. Imanuel testified that the dangerous method selected by Haag and himself meant he did not know what would happen if the platform was lifted above the upper limit switch. It was demonstrated by Todd's witness, DiCocco, with the electrical safety features eliminated, the car would have ridden above the upper limit switch level so that the sheave on the bottom of the car would contact with the shaft wall sheave and cut the cable.

Since Lykes had removed the stop bolt at the top of the shaft, bypassed seven safety features, drove the lift blindly by jabbing at the works with a screwdriver, the inference is overwhelming that this cut the cable, not some nebulous act of Todd's one week before.

A. The Prior Condition of the Cables

Lykes sought to show that the cables were sound when the vessel entered the Todd yard in June of 1971. Since Haag and Imanuel stressed they were in good shape up to thirty minutes before the fall only one inference flows. Since Todd quit the ship days before it is physically impossible that Todd cut the cable. DiCocco's reasoning be-

comes all the more convincing. Haag has suggested the possibility of a fellow crew member, hostile to him, had cut the cable.

Examination of the Cables after the Accident

It is interesting to note that Todd was permitted to see the cables for the first time after the accident during the course of the trial. It received no notice of the Brierly or Thompson survey. Lykes' evidence clearly establishes that after the accident, it retained possession of the cables until they were delivered to the Dixie Marine Shop which cut the cable into numerous pieces and then admitted it did not have the equipment to perform the necessary tests. The length of the cables from the bitter end to the cut is an important fact in the case. Mr. Brierly has testified that the length was 11′8″ (TT 139/140). Thompson has testified that the length was 16′7″ (TT 182). Mr. Kiste, surprisingly testified that the length of the cable was approximately 17′ (TT 217), 12′ (TT 218), 12½′ (TT 218) and 16′8″ (TT 234). If the court accepted the measurement of Brierly, then from the bitter end of the cable (i.e. that end anchored to the upper shaft) vertically down one wall then horizontally on the sheaves beneath the platform and up to the drum vertically along the other wall, the sheaves of the shaft and those on the bottom of the car could have cut the cable.

The Court's attention is called to *Shepard S.S. Co.* v. *U.S.A.*, 111 F. 2d 110, 113, which said:

> "The appellant has called our attention to certain considerations to be kept in mind in deciding factual questions like these. One of them is that where the party charged with liability for the damage is not given notice of any survey of the alleged damage and no excuse for such failure is shown, the claim of damage is to be viewed with some suspicion."

While Lykes has set forth portions of both Imanuel's and Haag's testimony, no reference is made to the following excerpt from Imanuel's testimony:

> "Q. Did it run at its normal speed?
>
> A. No, not at a normal speed. This is another thing you have to be very careful, it is a slow procedure, and one has to be very careful *because it is very dangerous.* (TT 80a)
>
> Q. Why was it very dangerous?
>
> A. Because by holding the relay end, if the limit switches on top is not working and the elevator pass the level, that might be a little dangerous, *I don't know what might happen then.*" (TT 81a)

In summary, Imanuel has testified that for some one to two hours in the morning of December 10, he had ridden the platform up and down the shaft and after lunch Haag, too, had ridden the platform. Imanuel noted that nothing was wrong with the cables, that if he had seen anything wrong, he would have jumped off the car. The cuts and blows described by Lykes would have been obvious to Imanuel. Imanuel has admitted that with the safety circuit bypassed, the platform could be run too high and that employing the method they selected the man controlling the movement of the car could not see where the car was stopping. He further testified that the upper limit switch was only 1½′ to 2′ from the coupling i.e. the wall sheave. Both Haag and Imanuel have testified that the alternative method was to rig a bosun's chair. Haag continued by stating that would take too much time, and said that attending to the electric circuits of the engineroom lift was purely a secondary function of his and that his prime function was to see that the winches were always operative.

POINT II

The facts submitted to the Trial Court require no inference as to the cause of the cables being cut. Lykes has failed in its proof.

Mr. Thompson, Salvage Association Surveyor, employed by Lykes "can only suggest the possibility that during the recent conversion at Galveston, Texas . . . the cables had been damaged."

Todd has succeeded, during the trial in introducing evidence to the contrary. Imanuel has testified that the method adopted by him and Haag to check the limit switches was very dangerous. That if the platform rode above the limit switches he did not know what would happen (TT p. 80a) (TT p. 87a).

Todd suggests that the upper wall sheave and the sheave under the platform could have cut the cable. Todd suggests that if the platform were raised too high with the shaft top safety bolts removed the sheave edge above the drum on the shaft wall could have cut the cable. The possible causes are numerous and Lykes has failed to establish any one of them.

It is basic law that an inference may be based only upon established facts. Inferences may not be drawn from inferences. It is equally well established that there is no presumption that a person has performed a task in a negligent manner. That must be proven by evidence. In the present case, the facts established by the court below are:

1. Todd moved certain pieces of equipment out of the engineroom of the NANCY LYKES through the shaft of the engineroom lift since it was the only means of access to those spaces.

2. There is no evidence that Todd performed its tasks in a careless or negligent manner.

3. On December 10, both Haag and Imanuel had ridden the engineroom lift platform from top to bottom of the shaft, although the lift was not designed for the carriage of people.

4. The method adopted by Haag & Imanuel in performing their task was "very dangerous."

5. The engineroom cables failed because they were cleanly cut. The elevator limit switches could have been tested by the use of gages in the engineroom lift control room.

6. As found by the court below, the cause of the accident was the negligence and carelessness of Imanuel and Haag.

POINT III

Todd had no obligation to call fact witnesses to prove it had not breached its warranty of workmanlike services.

In this point, Lykes is implying that Todd had the affirmative duty to establish its non-negligence. This is not the case and Todd did not seek to hide facts from Lykes.

Due to the difficulty obtaining detailed information from Todd's Galveston Yard by its New York counsel, Todd's attorney submitted to Lykes' attorney a list of some seven names of Todd employees who had worked on the NANCY LYKES and who were believed to have some knowledge of Todd's work on that vessel in December of 1971. The letter continued by inviting Lykes' attorneys to go to Galveston together with Todd's attorneys to interview these personnel of Todds and to take the depositions of any or all of them. Lykes accepted the invitation and at Galveston took the testimony of three of the suggested seven. Todd at the trial introduced excerpts from the deposition of Mr.

Welch and Lykes introduced excerpts from the deposition testimony of three of those employees. In addition, Lykes produced and called as witnesses at the trial Mr. Joseph Reilly and Mr. DeCocco who were most familiar with the operation of the Engine Room lift. Mr. Reilly was responsible for the design and manufacture of the lift and Mr. DeCocco was in charge of its installation on the NANCY LYKES. How much further Todd could have gone than this is not known by Todd's counsel. It was clearly Todd's counsel's intention to make available to Lykes' counsel all personnel having knowledge of Todd's work on the NANCY LYKES. There was no attempt to hide. It was not a failure to call a watch officer, a lookout, or to produce documents kept in the regular course of business as suggested in the cases cited by Lykes.

POINT IV

Todd's initial incorrect answers to interrogatories and request to admit are no base upon which to ground an inference.

Todd's first counsel in this litigation, based upon its then knowledge, admittedly incorrectly answered interrogatories and request to admit. This matter was fully discussed at conferences with the trial judge before trial and was further discussed with him during trial. This court's attention is respectfully called to the following discussion between counsel for both parties and the court during the trial:

> Mr. Doti: Mr. Healey I have never accused you of withholding any information. I told you that I sympathize with your position that your client undoubtedly gave the wrong information.
>
> Mr. Healey: Why read all of this stuff?
>
> Mr. Doti: No, sir, I think it is relevant to the case.
>
> The Court: Well, I don't. I don't, because what you are doing is raking over yesterday's ashes. This

is an old case. It has been pending for years. I have been seeing new faces in this case every time I turn around. I didn't have the pleasure of meeting you, Mr. Doti, until the other day, did I?

Mr. Doti: No, sir.

The Court: So you are the new face, you are the last new face I have met. There's been a whole gallery of distinguished gentlemen in this case, each one of them having been advised one way or another about what they were doing. I have a book full of notes about the things that were being done or not being done in this case, only to find myself frustrated year after year in trying to bring this case to trial, and it was only after Mr. Boal and Mr. Healey got into the case that they really got down to brass tacks and conducted the discovery down in Todd's.

Now, I don't doubt for a minute that in the course of the pretrial all kinds of people made a lot of silly mistakes and possibly verified papers which should never have been verified, just as somebody put September 15th on that enlargement of a photograph that wasn't taken until December. And you see how quickly Mr. Healey backed away from making capital out of that.

But if we are going to pick up and do a nitpicking job in this case we are never going to finish and I am not going to be impressed. The important thing is the pretrial procedures are intended to clarify, distill and update all the facts, and in the process of carrying out that tortuous procedure, very often mistakes are made; sometimes in bad faith, sometimes in good faith, and sometimes because people are so busy with too many things in order to keep anything straight.

Now, I don't want to feel as though I'm conducting a municipal court case for a small claims litigant, and any exploration of the pretrial I suggest can be reduced to writing.

If you want to make a point of it, prepare a memorandum in which you will cite all the contradictions made by everybody on different dates and you can submit that as a separate example, but I wish you wouldn't take trial time to go into it.

Mr. Doti: May I then suggest the next possibility is the fact that as a result of this pretrial work we went to Galveston and took depositions of three or four men produced by Mr. Healey. We have their depositions. I would like to offer their depositions in evidence, and in each of those depositions these men denied any knowledge of the facts that we were trying to uncover, which finally have now been admitted. I'd like to offer those depositions.

The Court: Maybe they didn't know. It is very strange how people who should know things sometimes don't know them and people who should know them don't.

You know the older I get listening to testimony, the less shocked I am by the surprising things that happen.

Mr. Doti: So we went to Galveston and we took a lot of depositions and we got nothing.

Then we came back, we insisted on further discovery and eventually we got some production of records. On the basis of those records, then Mr. Healey identified a certain man. We went back to Galveston and took his deposition, and that's the deposition that finally gave us some facts of what was moved out of the engine room.

The Court: I'm sorry you were put to so much trouble, Mr. Doti, but I am sure that you are not the first attorney who has been faced with that kind of a problem?

Mr. Doti: I do think it has some relevancy, your Honor.

May I introduce the deposition of—

The Court: You are not charging Mr. Healey with being less than forthright?

Mr. Doti: Not at all.

The Court: You are not charging him with bad faith and it seems obvious to me on the basis of the many conferences that I have had with him, which succeeded many other conferences I had with other attorneys, that at least when he got into the case, when Mr. Boal was in the case, there was a concerted and sincere and effective effort to bring out all the relevant facts.

Lykes refers to *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 96 S.Ct. 2778 (1976), as well as the *McCullen* case. The *National Hockey League* case, at 2780, in three sentences defines the function of an appellate court in reviewing the handling of pre-trial inadequacies of a litigant:

> "The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing. Certainly the findings contained in the memorandum opinion of the District Court quoted earlier in this opinion are fully supported by the record. We think that the lenity evidenced in the opinion of the Court of Appeals, while certainly a significant factor in considering the imposition of sanctions under Rule 37, cannot be allowed to wholly supplant other and equally necessary considerations embodied in that Rule."

Lykes in its brief, refers to *McCullen* to establish negligence and irresponsible handling of answers to interrogatories by Todd. The *McCullen* case has nothing to do with *Lykes* v. *Todd*. This court's attention is referred back to the specific remarks of the trial Judge quoted above

wherein he stated:

> "It was only after Mr. Boal and Mr. Healey got into the case that they really got down to brass tacks and conducted the discovery down at Todd's."

Lykes' attorney clearly stated before the trial Judge:

> "Mr. Healey, I have never accused you of withholding any information."

In this Point IV of Lykes' brief. Lykes is contending in this court what it admitted it was not contending in the court below.

POINT V

The broken rope safety device had not been maintained by Lykes. Its electrician did not know the device existed.

Lykes states that Noel Thompson was the only witness to testify as to the condition of the broken rope safety. This is not true.

To prove this statement, Todd submits below excerpts from Lykes' Exhibit 14 not included in its Appendix.

"(Haag Deposition pp. 36, 40.)"

> Q. Did he indicate to you that he was concerned about the condition or the possible condition of the hoist, because she had been sitting idle so long?
>
> A. Yes. He said, "The thing has been open all this time, you better check it out."
>
> Q. Having been told to check it out because it had been idle, you were checking the limit switches. Did you also just generally take note of the other conditions in the car to see if there was anything wrong?
>
> A. No.

Q. You did not notice anything wrong at all?

A. I didn't look for anything.

Q. *Still talking about this car, as I understand it, there is a fail safe type of brake underneath the car, is that correct? Is there a brake underneath the car?*

A. *No sir.*

Q. Are you sure of that?

A. I'm almost sure. I never saw it in the instruction book. I've been under the car already. I never saw anything that appeared like a brake.

Q. *You were never aware of any kind of braking device underneath the car?*

A. *No sir.*

Q. Was there any brake at all on this car?

A. No. The brake was on the drum.

Q. That would mean, simply, from stopping your cable from running off or spooling off, you would brake the drum?

A. It would break the drum and automatically stop the car.

Q. So the drum would stop rotating?

A. Yes.

Q. The brake, you are aware, functioned right on your winch and drum?

A. It's part of the motor that drives the drum. That I knew existed there.

Q. Do you know whether there was any safety braking device on this engineer's platform hoist in case your cables parted, to stop that thing from falling?

A. No sir, I was never aware of that. I never saw it in the instruction book. Some people talk about it now, but I was never aware of it.

Q. I would suggest to you that the surveyor's reports, afterwards, indicate there was a fail safe braking device underneath the car.

You had no knowledge of that at all?

A. No.

Q. *So I assume that you never maintained or cared for any kind of safety braking device under your car?*

A. *If there was, then I certainly never took care of it.*

Q. You could not, because you did not even know about it, isn't that right?

A. Yes.

Q. *Nobody ever told you to check to see whether there was a braking device?*

A. *No sir.*

Q. *I assume that you never gave instructions to anybody to check the braking device under the car, because you did not even know about it?*

A. *Certainly.*

Q. You could not tell Leonard to check it, because you did not know about it?

A. No.

Q. As far as you know, Leonard never cared for any kind of braking device on the car itself?

A. No.

Q. As far as you know, aboard The Nancy Lykes, no care and maintenance was ever given to any braking device that was on the car, is that correct?

Mr. Doti: During the period he was aboard?

Mr. Healey: Yes.

Q. Sometime in 1969 when you joined her, up until the time she went in for conversion, as I understand your testimony, neither you nor whoever the second electrician was—at one point it was another man—cared or maintained the braking device under the car, is that right?

A. I still maintain there wasn't any.

Q. I understand that.

A. Because I would know about it.

Q. Based upon your knowledge, there was no braking device under the car, and your department never took any efforts to check it or take care of it?

A. That's right.

Q. As I further understand you, the electrician's department were the only people on The Nancy Lykes who would care for the car, is that right?

A. The only brake—

Q. Just answer my question. I think you told me it was only the electrician's department that cared for the car?

A. Yes.

Q. So if you or Imanuel, whoever the second was, did not care for it nobody cared for it, because it was nobody else's job?

A. The chief engineer is responsible for the whole thing, actually, so if he ever would—I could never know whether he did or did not.

Q. You have no knowledge of the chief ever caring for this platform hoist?

A. I do not, no.

Q. I don't think you told me the time. You said you worked for an hour or more in the morning on the hoist?

A. Perhaps two hours. At least, an hour.

Q. Did you work up until your mealtime on the hoist? A. Not necessarily. In between the winches.

Q. You were working on the winches and on the hoist?

A. Yes.

Q. That was after dinner. What time was dinner? Was it 12:00 to 1:00?

A. Yes. From 1:00 o'clock we worked steady with that elevator.

Q. From 1:00 o'clock you and Leonard just directed all your attention to the hoist?

A. Yes.

Q. What time did that accident happen?

A. Between 2:00 and 3:00.

Q. So you had been working anywhere from one to two hours in the afternoon on the hoist?

A. Yes.

Q. Were you riding the car again, for a while, in the afternoon?

A. Perhaps one more time to the top floor.

POINT VI

The findings of fact of the Court below were adequately supported by the evidence.

Lykes complains of the Court's findings No. 17 and No. 24. If the cables were cut, as described by Lykes' witnesses, they would not have sustained the we ght of the platform and Mr. Haag or Mr. Imanuel. If such cut had occurred a few days before, the cable failure would have occurred then. Additionally, Mr. Imanuel has testified that he carefully looked at the cables during the morning of the date of the accident and found them completely in order. Any prior cutting would have been obvious.

With respect to Finding No. 31, there has been no evidence submitted by Lykes that any elevator mechanic has inspected or maintained the lift. Haag has testified of his lack of knowledge of the existence of the broken rope safety.

Finding No. 33 is fully supported by the evidence. Photographs taken in New Orleans show that bolts projecting through the guide rail at the top of the shaft had been removed. There is no evidence when they were removed.

Finding No. 36 was eminently correct. Imanuel clearly testified the method adopted by him was very dangerous and he did not know what would happen if the platform overrode the upper limit switches. From the foregoing findings, Finding No. 37 follows logically.

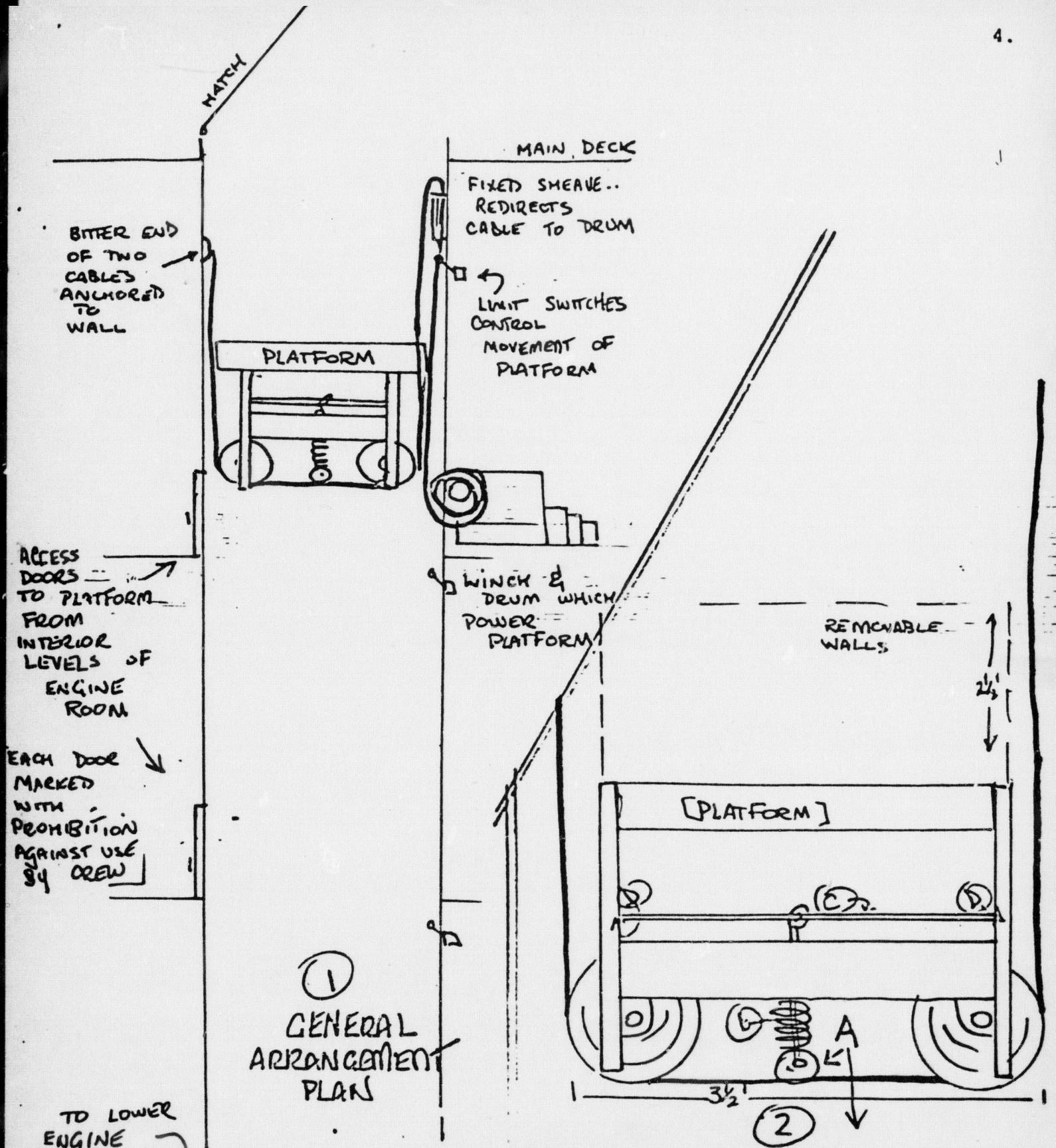
CONCLUSION

The decision of the trial court is fully in accordance with the law and facts and should be affirmed with costs to the appellee.

Respectfully submitted,

HEALEY, STONEBRIDGE & MCCAFFREY
Attorneys for the Appellee
19 Rector Street
New York, New York 10006
(212) 943-3520

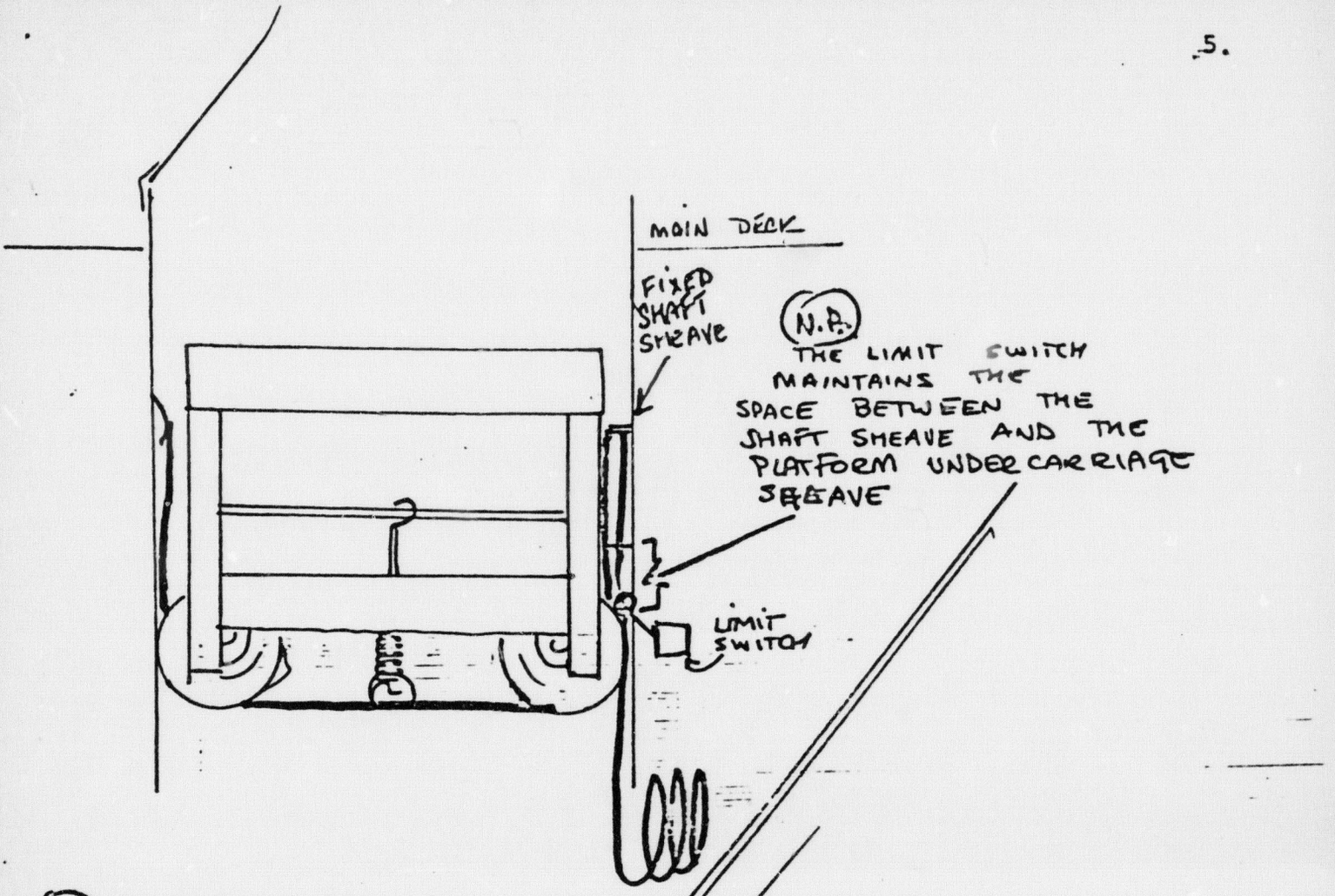
THOMAS H. HEALEY
Of Counsel



① GENERAL ARRANGEMENT PLAN

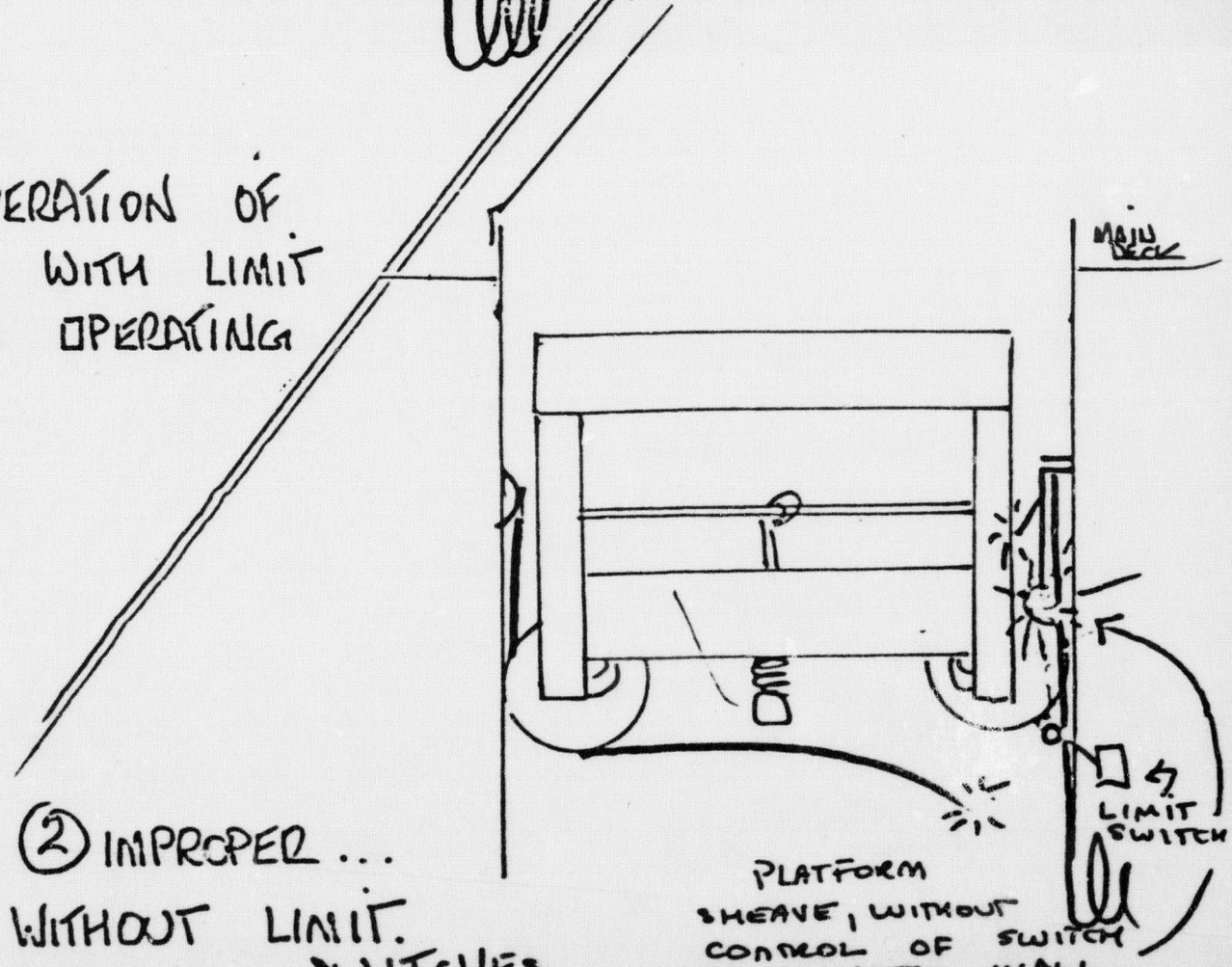
② PLATFORM DETAIL

A. FAIL SAFE BRAKE IF CABLE GOES SLACK COILED SPRING FORCES ROD (B) DOWN, ROTATING BAR (C) CAUSING TEETH WITHIN GUIDES (D) TO SEIZE ROLL, STOP CAR

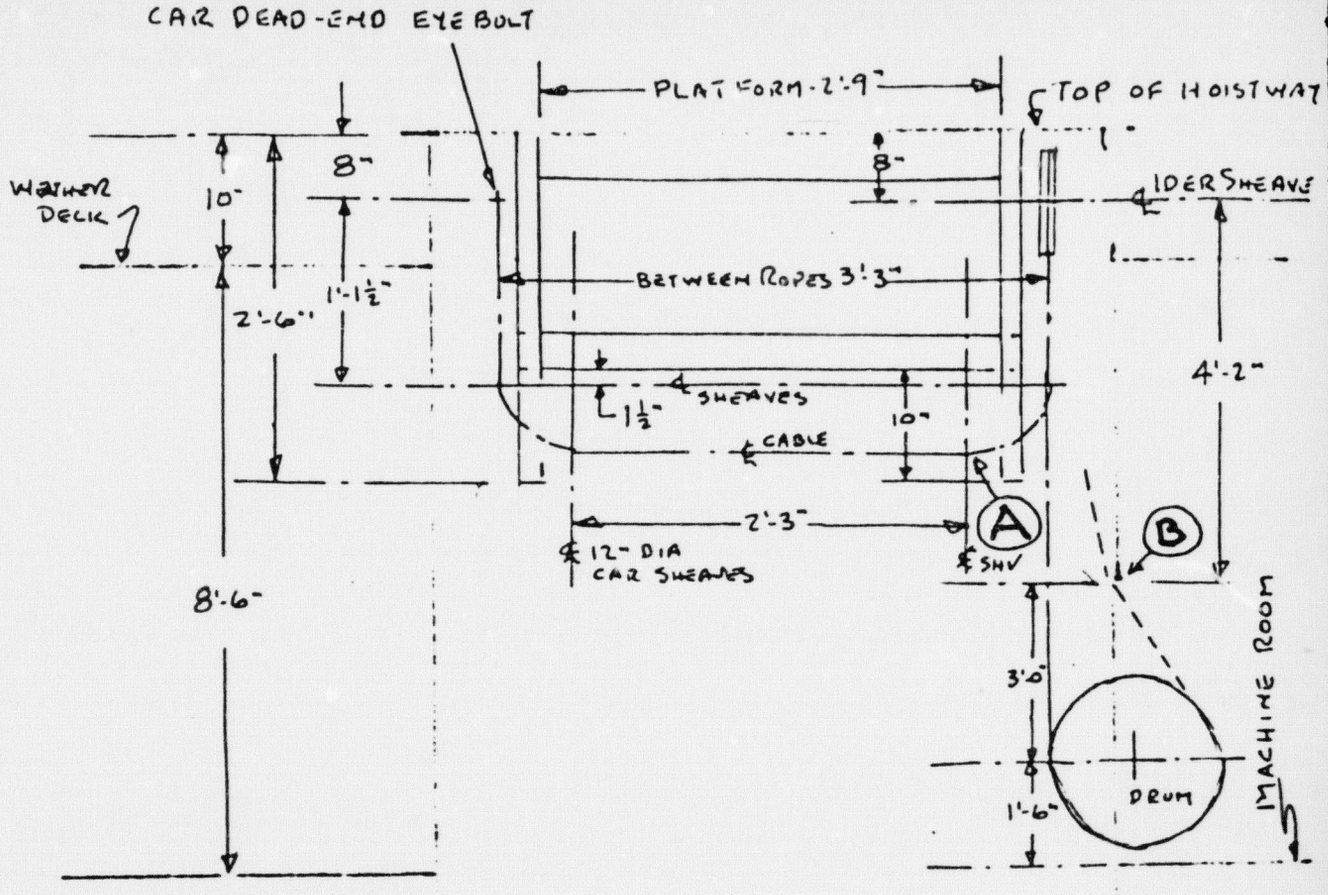


(1)

PROPER OPERATION OF PLATFORM WITH LIMIT SWITCHES OPERATING



(2) IMPROPER ... WITHOUT LIMIT SWITCHES



LENGTH OF CABLE - CAR AT TOP

EYEBOLT TO PITCH LINE CAR SHV	1'-1½"	
25% OF 12" CAR SHV CIR	9⅜"	
℄ ONE CAR SHEAVE TO ℄ OF OTHER	2'-3"	
TOTAL DISTANCE - EYEBOLT TO (A)	4'-1⅞"	
LENGTH OF CABLE FROM (A)		
25% OF 12" SHV CIR	9⅜"	
℄ CAR SHEAVE TO ℄ IDER	1'-1½"	
50% OF IDLER CIR	1'-6¾"	
℄ IDLER SHV TO (B)	4'-2"	7'-7⅝"
TOTAL DISTANCE EYEBOLT TO (B)		11'-9½"

FOR EVERY FOOT THE CAR IS BELOW THE TOP ADD ONE FOOT TO (A) DISTANCE AND TWO FEET TO (B) DISTANCE.

TRUNK OF ENGINEER'S PLATFORM HOIST FOR LYKES BROS

ENERGY ELEVATOR CO

CH-62801/4

EXHIBIT - F

DETAIL SHOWING CAR PLATFORM STOPPED AT TOP OF HOISTWAY

Admitted in evidence.

375—Affidavit of Service

United States Court of Appeals
for The Second Circuit

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

Leonard Imanuel

Plaintiff

against

Ly kes Brothers Steamship Co. Inc.,

Defendant and Third Party
Plaintiff-Appellant

against

Todd Shipyards Corporation

Third Party Defendant-Appellant

AFFIDAVIT
OF SERVICE

STATE OF NEW YORK,
COUNTY OF New York , ss:
Raymond J. Braddick, agent for Thomas H. Healy being duly sworn,

deposes and says that he is over the age of 21 years and resides at
Levittown, new York

That on the 18th. day of October 1976 at
225 Broadway New York, New York
he served the annexed Brief upon
Boal Deti & Larsen Esqs.

in this action, by delivering to and leaving with said attorneys
3 true copy thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said action

Deponent is not a party to the action.

Sworn to before me, this 18th.
day of October 1976

Raymond J. Braddick

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 43-0705
Qualified in Delaware County
Commission Expires March 30, 1977